

ROC UNITED

April 14, 2021

Sent via: <https://www.federalregister.gov/documents/2021/03/25/2021-06244/tip-regulations-under-the-fair-labor-standards-act-flsa-delay-of-effective-date>

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage & Hour Division, U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Restaurant Opportunities Centers United Comments on Tip Regulations Under the Fair Labor Standards Act (FLSA); Delay of Effective Date, Regulatory Information Number (RIN) 1235-AA21.

Dear Ms. DeBisschop:

Restaurant Opportunities Centers (ROC) United submits these comments in favor of the Department of Labor's ("Department" or "DOL") notice of proposed rulemaking ("NPRM") to further extend the effective date of three portions of the 2020 Tip final rule, until December 31, 2021. This delay will enable the Department to complete rulemaking and to consider and repropose portions of the 2020 tipped worker rule. In addition, the Department has requested comment on the substance of the delayed portions of the Tip Rule, and we include brief substantive recommendations on those portions.

ROC United was founded after September 11, 2001, as a worker relief center for affected restaurant workers and their families in New York City. ROC United has grown into a national organization powered by local chapters throughout the U.S. The restaurant industry is one of the largest and fastest-growing industries in the United States, employing more than 9 percent of the total private-sector workforce—13.5 million people in 2019. ROC United serves and represents all workers in the industry, from traditional Back and Front-of-the-House occupations in fine dining full service restaurants, to combined food prep and serving workers in quick service, to the new and growing segment of app-based delivery.

ROC UNITED
275 7th Ave, Suite 1703
New York, NY 10001



ROC UNITED

ROC United has offices in Los Angeles, Oakland, Minneapolis, Chicago, Detroit, Pittsburgh, Philadelphia, New York, New Orleans, Jackson, Mississippi, and Washington, DC, with members across the country. ROC United has a vested interest in ensuring that all restaurant workers, and all other service occupations that depend on tips for their livelihood, receive the basic workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws, including the minimum wage and overtime protections of the Fair Labor Standards Act ("FLSA" or "Act").

ROC United supports the Department's proposed further delay of those portions of the Tip Rule regarding the dual jobs and civil monetary penalties provisions of the Rule, in order to evaluate additional information about the questions of law, policy, and fact raised by these portions of the final rule.

The 2020 Rule improperly narrowed the protections of the FLSA for tipped workers in a variety of fast-growing industries including delivery, limousine and taxi, airport workers, parking, carwash, and valet, personal services and retail, in addition to restaurants and hospitality. The federal minimum wage for tipped workers has been stuck at \$2.13 since 1991, despite significant increases in the cost of living since then. And too many tipped workers struggle to make ends meet, in part because the industries they work in are characterized by high rates of FLSA violations by their employers. The Department routinely identifies significant wage violations in industries with large concentrations of tipped workers,¹ and yet failed to support its new policy change with factual findings that contradict its earlier positions.²

The majority of tipped worker occupations are food service occupations, but millions of workers more in a variety of fast-growing industries including hotels and hospitality, delivery, limousine and taxi, airport workers, parking, carwash, and valet, and personal services and retail also depend on tips for their livelihood. Customarily tipped restaurant

¹ See, e.g., <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

² See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'" (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009))); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

ROC UNITED

275 7th Ave, Suite 1703
New York, NY 10001



ROC UNITED

occupations include bartenders; counter attendants, cafeteria, food concession, and coffee shop workers; servers; food delivery; dining room and cafeteria attendants (bussers and bar-backs, and bartender helpers; and hosts and hostesses. Other customarily tipped occupations: Massage Therapists; Gaming Services Workers; Barbers; Hairdressers, Hairstylists, and Cosmetologists; Manicurists and Pedicurists; Shampooers; and Skin Care Specialists; Baggage Porters, Bellhops, and Concierges; and Parking Lot Attendants. Tipped occupations regularly earning at least \$30 in tips per month are eligible to be paid the federal subminimum wage of \$2.13 per hour. However, the growth of contactless service over the last year has dramatically disrupted the concept of customary tipping. Workers who were not customarily tipped saw dramatic and consistent increases in rates of tipping, while other workers, such as servers, saw dramatic declines in the tips they received. The experience of the past year demands delay of the effective date of the proposed regulations to permit the Department to reconsider the factual, policy, and legal issues raised by the Rule.

ROC United supports a further delay of the identified portions of the 2020 Tip Rule for the reasons set forth below. We also include brief substantive recommendations for the Department to consider as it proceeds in this rulemaking.

- 1. The economic restructuring experienced during the pandemic calls into question the definition of a customarily tipped worker and these changes to the workforce and employment practices must be taken into consideration by the Department.**

Restaurant servers across the country have related dramatic declines in tipping due to restrictions on dining capacity as well as a dramatic drop in demand, while non-tipped occupations have reported an increase in tips. Restaurant workers across multiple occupations have related that their work roles have shifted to include significant additional tipped duties for non-tipped occupations, and significant additional non-tipped duties for tipped occupations. The rise in contactless service interactions and purchases, along with growth in app based delivery, has transformed the culture of tipping, dramatically reducing customarily tipped interactions and increasing tipping in non-tipped circumstances. The impact of all of these changes must be examined and considered.

ROC UNITED

275 7th Ave, Suite 1703
New York, NY 10001



ROC UNITED

2. The Tip Rule’s rescission of the “80/20” rule on tipped duties permits employers to call more workers “tipped,” and pay them the subminimum wage of \$2.13/ hour, with nearly no barriers to doing so.

The Tip Rule allows an employer to require nontipped duties for “any amount of time” when the tipped worker is simultaneously engaged in tip generating duties, and for a “reasonable” amount of time before and after performing tipped duties. This Rule would diminish tipped workers’ capacity to earn tips and diminish employer hiring of workers in nontipped occupations (e.g., cleaners, maintenance, prep, and back-office workers). The Rule particularly harms the women and people of color who comprise most of the tipped workforce. Women comprise 60 percent of all tipped restaurant workers, and 70 percent of all servers, and workers of color comprise 40 percent of both.³

As the Department recognizes, Section 3(m) only allows employers to take a tip credit for a “tipped employee,” defined at section 3(t) as an “employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” This definition requires further explanation, because an individual employee may be employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage).

The “dual jobs” regulation at 29 C.F.R. § 531.56(e) distinguishes between an employee who holds both a non-tipped and a tipped occupation, and a person in a tipped occupation who performs some related non-tipped tasks. Between 1988 and 2018, guidance from the Department clarified the dual jobs regulation with the “80/20 rule,” which provided a necessary limit: when an employee spends more than 20 percent of their time during a workweek on activities that are related to the tipped work but do not produce tips, the employee is no longer a tipped employee during the hours spent on related, non-tipped work and must be paid no less than the regular minimum wage for that time.⁴ This guidance is vital to protect tipped employees from abuses of

³ ROC United calculations based on U.S. Census Bureau, American Community Survey 2015-2019. Steven Ruggles, Sarah Flood, Sophia Foster, Ronald Goeken, Jose Pacas, Megan Schouweiler, and Matthew Sobek. IPUMS USA: Version 11.0 [dataset]. Minneapolis, MN: IPUMS, 2021. <https://doi.org/10.18128/D010.V11.0>.

⁴ See U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(e) (Dec. 9, 1988); see also, e.g., Belt, 2019 WL 3829459 at *25.



ROC UNITED

the two-tiered wage system. Without this protection, tipped workers would have no recourse should their employer take advantage of their second-tier pay status by assigning them heavy non-tipped workloads.

By removing this bright-line limit on the time for which an employer may take a tip credit for an employee's related, non-tipped work, the Tip Rule threatens to further depress pay for tipped workers. Indeed, the Department acknowledged in the NPRM that tipped employees may "lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage."⁵ Back-of-house employees and workers in non-tipped occupations will also lose out under the Department's amendments to the dual jobs rule. If an employer can pay a tipped employee less to spend more time on "related" tasks like cleaning and food prep that have traditionally been performed by back-of-house staff, that will drive down wages for—or even eliminate—back-of-house positions in restaurants, and related maintenance and prep jobs in other workplaces like hotels, carwashes and parking lots, and service establishments.

The DOL's justification for changing its position on the 80/20 rule is that it "was difficult for employers to administer and led to confusion."⁶ To the contrary, the 80/20 rule has been consistently used and accepted by courts and the Department itself over a 30-year period.⁷ In fact, even after the Department released its November 2018 Opinion Letter rescinding the 80/20 Rule, nearly every court to consider it has declined to afford it any deference and has continued to recognize the 80/20 Rule.⁸ We encourage the Department to use the period of delay to withdraw the portion of the Tip Rule amending the dual jobs regulation and re-propose amendments that establish a standard no less protective than the long-standing 80/20 Rule.

3. The Tip Rule permits employers to take employees' tips, in violation of the

⁵ 2019 Tip Rule, 84 Fed. Reg. at 53,972.

⁶ *Id.*

⁷ See, e.g., citations in comments submitted by NELP on February 17, 2021, in favor of the delay of this Rule.

⁸ See, e.g., citations in comments submitted by NELP on February 17, 2021, in favor of the delay of this Rule.

ROC UNITED
275 7th Ave, Suite 1703
New York, NY 10001



ROC UNITED

recent Congressional Amendments to the FLSA in 2018.

The Tip Rule does not comply with the 2018 Congressional Amendments to Section 3(m) of the FLSA, as explained above, and as alleged in the states' legal challenge. Given Congress's clear command that employers may not keep employees tips, employers' use of tips to satisfy their minimum wage obligations should be minimized. Instead, the Tip Rule repeals the longstanding 80/20 rule and substitutes a much weaker standard that will harm tipped workers. In doing so, DOL is in contravention of Congressional intent.

The Economic Policy Institute estimates (conservatively) that if the Tip Rule is allowed to take effect, tipped workers will lose more than \$700 million dollars in pay each year,⁹ in the midst of the COVID-19 economic crisis in which they have already seen their tips plummet.¹⁰ And this loss would likely especially harm the women and people of color who are both disproportionately represented in the tipped workforce and have borne the brunt of the pandemic's devastating impacts. Conversations with our members reinforce these findings — pandemic related limitations on dining capacity and reduced demand from a concerned public have dramatically reduced tips even as close to 45 percent of the industry has suffered from unemployment and underemployment. Prior to the pandemic, 13 percent of servers employed full-time lived in poverty compared to four percent of the total workforce. This over three-fold disparity will only increase if the Tip Rule takes effect.¹¹

4. The lawsuit filed by eight states and the District of Columbia merits further review and revision of the Tip Rule.

Attorneys General of Pennsylvania, Illinois, Massachusetts, Delaware, the District of Columbia,

⁹ Heidi Shierholz & David Cooper, *Workers Will Lose More Than \$700 Million Annually Under Proposed DOL Rule*, WORKING ECON. BLOG (Nov. 30, 2019), <https://www.epi.org/blog/workers-will-lose-more-than-700-million-dollars-annually-under-proposed-dol-rule/>.

¹⁰ See, e.g., One Fair Wage et al., *Take Your Mask Off So I Know How Much to Tip You: Service Workers' Experience of Health & Harassment During COVID-19* (Nov. 2020), https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf (finding in a survey of 1,675 food service workers in 5 states and Washington, D.C. that 83% had experienced a decline in tips during the pandemic, with nearly two-thirds of respondents reporting that tips had declined by at least 50%).

¹¹ See, *supra*, note 3.

ROC UNITED

275 7th Ave, Suite 1703
New York, NY 10001



ROC UNITED

Maryland, Michigan, New Jersey, and New York filed suit against the Department in January raising several legal issues regarding the Tip Rule. The lawsuit focuses especially on the elimination of the 80/20 Rule, and claims that the Rule contradicts the text and purpose of the Fair Labor Standards Act. It also asserts that the DOL violated rulemaking process requirements, including failing to analyze the impact the rule would have on tipped workers.

Proceedings in this case are currently stayed pending the Department's review of the issues of law, fact, and policy raised by the proposed rule, and the further delay proposed here will allow the Department the time needed to appropriately consider and address these issues through additional rulemaking.

5. The Tip Rule should be delayed because of its improper narrowing of the reasons for assessing civil monetary penalties against employers.

The Tip Rule's redefinition of willfulness improperly *weakens* worker protections, contrary to the language of the FLSA and its recent Congressional amendments, where Congress sought to increase civil penalties, and must be reassessed. Despite Congress's clear intent to provide for civil money penalties for violations of section 3(m) without finding a willful violation, the DOL Tip Rule unlawfully adds a willfulness requirement. That is contrary to the plain language of the statute and must be removed.

* * *

Thank you for your attention to these comments on a critical issue facing millions of workers.

ROC UNITED

275 7th Ave, Suite 1703
New York, NY 10001

